UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VICKI L. ABBOTT

Plaintiff,

-v.-

97 Civ. 7648 (JSM)

HARRIS PUBLICATIONS, Inc., DOG NEWS: THE DIGEST OF AMERICAN DOGS, MATTHEW H. STANDER, SARI BREWSTER TIETJEN, THE AMERICAN KENNEL CLUB, Inc., DAVID C. MERRIAM, MARIE E. (Mary Beth) O'NEILL, ANNE D. SAVORY, DENNY MOUNCE, DOROTHY M. MacDONALD, ANN D. HEARN, AND JOHN DOES I THROUGH X

MEMORANDUM OPINION AND ORDER

Defendants.

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JOHN S. MARTIN, Jr., District Judge:

This is a defamation, conspiracy and due process action by plaintiff Vicki L. Abbott (Abbott). It is before the Court on cross motions. Abbott seeks leave to amend her complaint pursuant to Fed R. Civ. P. 15(a). Defendants America Kennel Club (the "AKC"), Mary Beth O'Neill, David Merriam and Anne Savory (the "AKC Defendants") move for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Defendants Harris Publications, Dog News: The Digest of American Dogs, Matthew Stander and Sari Brewster Tietjen (the "Harris defendants") also move for judgment on the pleadings per Rule 12(c). Defendant Dorothy MacDonald moves to dismiss the complaint against her pursuant to Rule 12(b)(6) for failure to state a claim and defendant Ann Hearn moves for judgment on the pleadings under

Rule 12(c). Plaintiff's motion to amend is denied. Defendants' motions for judgment on the pleadings are granted in part and denied in part.

Facts

The facts recited below are taken exclusively from the First Amended Complaint and, for purposes of the Rule 12(c) and Rule 12(b)(6) motions are considered true. Mills v. Polar Molecular Corp. 12 F.3d 1170, 1174 (2d Cir. 1993).

Plaintiff Vicki L. Abbott is a professional dog breeder who has lived most of her life in Texas. In January 1995, Abbott submitted an application to be an AKC judge. The AKC authorized Abbott to judge seven of the Toy breeds, and in April 1995 Abbott submitted an amended petition requesting authorization for six additional Toy breeds. In May, O'Neill, who was AKC's Director of Judging Applications and Mounce, who is a professional dog handler and had previously learned the contents of Abbott's judging application, spoke with each other about Abbott's application. Mounce also sent a letter to the AKC stating that Abbott's application contained factual inaccuracies. In July the AKC voted to revoke Abbott's authorization to judge any of the Toy breeds. Abbott appealed the revocation to the Judge's Review Board, which recommended to the AKC that it reinstate Abbott's permission to judge seven Toy breeds. The AKC followed the Review Board's recommendation in January 1996 and authorized Abbott to judge seven Toy breeds.

The Harris defendants then published articles in Dog News accusing Abbott of having lied on her application. MacDonald, who was president of the Dog Judges Association of America, sent a letter to the Chairman of the AKC concerning the accusations and proposing a group of individuals to adjudicate it. In February of 1996, the AKC Board suspended Abbott's judging privileges in order to investigate whether her application contained false statements. In March or thereabouts, the AKC Board notified Abbott that her judging approval had been revoked because of "false representations on [her] application." Compl. ¶ 56.

Plaintiff's Motion to Amend

Plaintiff moves for permission to amend her complaint and omit the allegation contained in Paragraph 60 alleging a cause of action arising under the U.S. Constitution. Fed. R. Civ. P. 15(a).

Procedural History

Plaintiff originally sued defendants in the District Court of Collin County, Texas, on December 5, 1996. On December 20, 1996, the AKC defendants, with the consent of the remaining defendants, removed the case to the U.S. District Court for the Eastern District of Texas, Sherman Division. On January 13, 1997, the AKC defendants moved to transfer the case here. On January 28, 1997, plaintiff moved for permission to amend her

complaint and for remand to the Texas state court. On March 5, 1997, Judge Paul Brown of the Eastern District of Texas denied plaintiff's motion to amend and remand.

The case was transferred from Texas to New York on March 7, 1997. On March 20, 1997, plaintiff moved in the Eastern District of Texas for reconsideration of the order transferring the case. On April 4, 1997, this Court transferred the case back to Texas for consideration of the motion to reconsider. Before the Texas court received the file, however, plaintiff on April 3 petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus seeking withdrawal of the Eastern District Court's decision not to remand to state court and the order transferring the case to New York. Plaintiff also sought an order from the Court of Appeals remanding the case to Texas state court.

The Court of Appeals denied plaintiff's petition. In re Vicki L. Abbott, No. 97-40375 (5th Cir. April 8, 1997). On reconsideration, Judge Brown declined to change his ruling and ordered the case transferred back to New York on October 6, 1997.

Discussion

Plaintiff's wish to strike the federal claims from her complaint has already been addressed by Judge Brown in the Eastern District of Texas by his March 5, 1997 order. The law of the case doctrine precludes revisiting an issue once decided in a given case. This rule maintains consistency in an action and

promotes efficiency. Pescatore v. Pan American World Airways, 97 F.3d 1, 7 (2d Cir. 1996).

Both the present motion and the motion before Judge Brown deal with the same issue: whether plaintiff may avoid federal jurisdiction by amending her complaint to omit her federal constitutional claim. In her February 7, 1997 motion to Judge Brown, Abbott stated "Plaintiff has applied for leave to amend the complaint to remove the only reference to the Constitution which is contained in Paragraph 60 because plaintiff does not have, and did not intend to claim, a personal right to due process under the Constitution." See Christensen Aff. C, Plaintiff's Memo. of Law in Support of Motion to Remand Action to State Court 2.

This is, of course, the gravamen of plaintiff's present motion: "From inception, Abbott has insisted that she neither alleged, nor intended to allege, a claim arising under the Constitution." Plaintiff's Memo. of Law in Support of Motion to Amend Complaint 8.

It is obvious from the pleadings that plaintiff raises here a claim that has been considered twice by the Texas District Court and once by the Fifth Circuit Court of Appeals. This Court will not disturb Judge Brown's ruling, and plaintiff's motion to amend is therefore denied.

Motions for Judgment on the Pleadings

Dismissal is proper under both Rules 12(c) and 12(b)(6) only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994) (Rule 12(c)); Automated Salvage Transport v. Wheelabrator Environ. Sys., 155 F.3d 59, 67 (2d Cir. 1998)(Rule 12(b)(6)) citing Conley v. Gibson, 355 U.S. 41, 45, 78 S. Ct. 99, 101 (1957).

Plaintiff claims Texas law applies to her state law claims, while Defendants seek to apply the law of New York.

When a case is transferred from one district court to another, the Court applies the conflicts rules of the transferring jurisdiction. Shah v. Pan American World Services, 148 F.3d 84, 94 (2d Cir. 1998) citing Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805 (1964). Applying Texas law to the question of whether New York or Texas defamation law applies, Texas has adopted a most significant relationship test as set forth in the Restatement (Second) of Conflict of Laws, §§ 6 and 145. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420 (Tex. 1984); Gutierrez v. Colins, 583 S.W.2d 312, 318 (Tex. 1979); Brown v. Hearst Corp., 862 F.Supp 622, 627 (D. Mass. 1994).

The elements in the Restatement analysis adopted by Texas include, inter alia, the state which has the most significant relationship to the occurrence, the place where the conduct

causing the injury occurred and the domicile and place of business of the parties. Gutierrez, 583 S.W.2d at 319.

In this defamation action, New York has a closer relationship to the parties and to the events in question. The AKC is incorporated in New York and chartered by the New York Legislature. Dog World magazine is published here. In addition, a majority of the personal defendants live in the New York metropolitan area, and most of the conduct complained of occurred in New York. This is particularly true of Defendants' alleged violation of the due process clause of the New York Constitution. Compl. ¶ 60. All decisions regarding Abbott's application were made in New York, and records of and witnesses to the application process are more likely to be located in New York than in Texas.

These factors outweigh the reasons to apply Texas law, namely that the plaintiff lives in Texas and that the allegedly defamatory statements in Dog World magazine were read by Texas residents. Because this case has a more significant relationship to New York than to Texas, New York law applies.

The New York Law of Defamation

A defamation claim in New York has four elements. Plaintiff must plead: 1) a false and defamatory statement of and concerning plaintiff; 2) publication to a third party; 3) the requisite degree of fault; and 4) special harm or per se actionability. Weinstein v. Friedman, 1996 WL 137313 (S.D.N.Y. March 26, 1996) citing Church of Scientology Int'l v. Eli Lilly & Co., 778 F.

Supp. 661, 666 (S.D.N.Y. 1991); Box Tree South Ltd. v. Bitterman, 873 F.Supp. 833, 844 (S.D.N.Y. 1995).

This opinion primarily addresses the first element, falsity and defamation. In New York, "truth is an absolute, unqualified defense to a civil defamation action." Guccione v. Hustler Magazine, 800 F.2d 298, 301 (2d Cir. 1986); Commonwealth Motor Parts v. Bank of Novia Scotia, 355 N.Y.S.2d 138, 141 (N.Y. App. Div. 1974); Chung v. Better Health Plan, 1997 WL 379706 (S.D.N.Y. 1997). Plaintiff has the burden of showing the falsity of factual assertions. Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235, 250, 566 N.Y.S.2d 906, 914 (N.Y. 1991) citing Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776, 106 S.Ct. 1558, 1563 (1986).

Whether a statement is capable of defamatory meaning is a threshold question of law to be resolved by the court. Weinstein, 1996 WL 137313 *10; Aronson v. Wiersma, 65 N.Y.2d 592, 593, 493 N.Y.S.2d 1006, 1007 (N.Y. 1985); James v. Gannett Co., 40 N.Y.2d 415, 419, 386 N.Y.S.2d 871, 874 (N.Y. 1976); Tracy v. Newsday, 5 N.Y.2d 134, 136, 182 N.Y.S.2d 1, 3 (N.Y. 1959).

A defamatory statement is one which tends to "expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right thinking persons, and to deprive him of their friendly intercourse in society." Foster v. Churchill, 87 N.Y.2d 744, 751, 642 N.Y.S.2d 583, 587 (N.Y. 1996) citing Rinaldi v. Holt, Rinehart & Winston,

42 N.Y.2d 369, 379, 397 N.Y.S.2d 943, 949 (N.Y. 1977). See also Golub v. Enquirer/Star Group, 89 N.Y.2d 1074, 1076, 659 N.Y.S.2d 836, 837 (N.Y. 1997) (A writing is defamatory "if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number in the community") accord Tracy, 5 N.Y.2d at 135, 182 N.Y.S.2d at 3; Mencher v. Chesley, 297 N.Y. 94, 100 (N.Y. 1947).

In determining whether a writing is defamatory, the Court must "consider the publication as a whole," and "not pick out and isolate particular phrases." Immuno AG, 77 N.Y.2d at 250, 566 N.Y.S.2d at 914. The meaning of a writing "depends not on an isolated or detached statement but on the whole apparent scope and intent." Davis v. Ross, 754 F.2d 80, 83 (2d Cir. 1985). The publication must be viewed from the perspective of the average reader, and the Court must not strain to place a particular interpretation on the published words. Lastly, the Court will read the statement "against the background of its issuance" regarding the circumstances of publication. Id.

In determining whether the excerpts included in Abbott's complaint are defamatory, the Court may look at the entire document to assess the context of the complained-of words. This is a departure from general practice under Rules 12(c) and 12(b)(6), where the Court normally limits itself to the four corners of the complaint. Northrop v. Hoffman of Simsbury, 134 F.3d 41, 44 n.2 (2d Cir. 1997); Kramer v. Time Warner, 937 F.2d

767, 773 (2d Cir. 1991); Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357. Generally, when parties have submitted materials outside the pleadings, the Court must either exclude the additional documents or convert the motion into one for summary judgment under Rule 56. Kramer, 937 F.2d at 773.

In the event a plaintiff alleges a claim based on a written instrument, as is the case here, the Court may consider such an instrument in ruling on a Rule 12(b)(6) or Rule 12(c) motion even if the instrument was not attached to the complaint. Rodriguez v. American Friends of Hebrew Univ., 1998 WL 146227 (S.D.N.Y. March 25, 1998) (Koeltl, J.) (In deciding a motion, court may consider documents referenced in the complaint and documents in plaintiff's possession which were relied upon in bringing suit); Hogan v. DC Comics, 983 F.Supp. 82 (N.D.N.Y. 1997) (McAvoy, Chief J., on reconsideration); National Football League v. Dallas Cowboys, 922 F.Supp. 849, 853 (S.D.N.Y. 1996); Sazerac Co. v. Falk, 861 F. Supp. 253, 257 (S.D.N.Y. 1994); see also Brass v. Am. Film Techn., 987 F.2d 142, 150 (2d Cir. 1993); Cortec Indus. v. Sum Holdings, 949 F.2d 42, 47 (2d Cir. 1991); I. Meyer Pincus & Assoc. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991). In this case, the Court will consider the entire publications from which the allegedly defamatory statements were culled.[1]

[1]Affidavit of Toby M.J. Butterfield (Butterfield Aff.)
Affidavit of Debra I. Resnick (Resnick Aff.)

We now turn to the statements at issue contained in Paragraph 62 of the First Amended Complaint.

Statement i ("The Way It Is," written by Defendant Tietjen).

> There is every reason to believe that a person has been less than honest on an application to judge.
>
> A number of them (persons listed in Abbott's application" [sic] told the investigator that certain statements in the application were false.
>
> On a personal note, as one of the individuals falsely listed on the application, I find it intolerable that this column is even necessary.

Statement i meets the pleading requirements for defamation because it accuses Abbott of lying on her judging application. Accusations of duplicity and mendacity are likely to expose the accused to disgrace and contempt among participants in a sport that values honesty and integrity. Foster, 87 N.Y.2d at 751, 642 N.Y.S.2d at 587.

The title and tone of "The Way It Is" may be fairly considered to be an opinion piece and not real news. Statements of opinion which do not "contain a provably false factual connotation" are protected by the U.S. and New York constitutions. Milkovich v. Lorrain Journal Co., 497 U.S. 1, 17-21; 110 S.Ct. 2695, 2704-2707 (1990); Immuno AG, 77 N.Y.2d at 256, 566 N.Y.S.2d at 906. The question under federal and New York law is "whether a reasonable reader could have concluded that the articles were conveying facts about the plaintiff." 600 W. 115th St. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 139, 589

N.Y.S.2d 825, 829 (N.Y. 1992) (citations omitted). To make this determination under New York law, the Court must view the challenged statements and determine: (1) whether the language at issue has a precise and readily understood meaning; (2) if the statements are capable of being proven true or false; and (3) whether the context of the communication signals readers that the words are opinion and not fact. Gross v. New York Times Co., 82 N.Y.2d 146, 153, 603 N.Y.S.2d 813, 817 (N.Y. 1993) (internal citations and quotations omitted). Defamatory statements of opinion that imply a basis of fact that are not disclosed to the reader are actionable while those that are accompanied by a recitation of supporting facts, or those that do not imply the existence of such facts, are not. Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d at 817; Potomac Valve & Fitting Co. v. Crawford Fitting, 829 F.2d 1280, 1290 (4th Cir. 1987).

In the case of Statement i, the Court finds that the statement "There is every reason to believe that a person has been less than honest on an application to judge" is supported by the fact that "AKC's investigator contacted a number of the people listed on the application. A number of them told the investigator that certain statements in the application were false." Teitjen goes on to say that her name was "falsely listed on the application."

Tietjen's belief that Abbott was dishonest is protected opinion. However, Abbott may prevail in her claim that the

underlying "fact" that unnamed individuals told the AKC investigator that her application contained falsehoods was defamatory. This statement may be proven true or false, as can the fact that Teitjen's own name was wrongly listed on the application. Thus, the only actionable issue concerning Statement i is whether Tietjen's report of statements made to the AKC investigator are true and whether her name was falsely listed on the application. See Restatement [Second] of Torts § 566, comment c.[2] The motion for judgment on the pleadings regarding Statement i is denied.

Statement ii ("The Way It Is," written by Defendant Tietjen).

> . . . (A)s evidenced by a recent vote of AKC Board of Directors to reward falsification by granting judging privileges, the honesty of an applicant was not important to seven members of the Board.
>
> The other directors attending that meeting voted to grant breeds to judge to an individual who wantonly and deliberately falsified the judging applications. . . . Falsification is the name of the game. Deliberate misrepresentations are acceptable. Lies are permissible

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[2]A somewhat analogous set of facts was addressed by the Court in Milkovich: "If a speaker says, 'In my opinion John Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement 'Jones is a liar.'" Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-19, 110 S.Ct. 2695, 2705-706, (1990).

Statement ii is similar to and gives rise to the same issues as Statement i. The defamatory (and for purposes of this 12(c) motion false) allegations of wanton and deliberate falsification are supported by the results of the AKC investigation that Teitjen reported.

Unlike Statement i, both statements are presented as facts to support defendant Teitjen's opinion that the AKC was being poorly administered. Although Teitjen's allegations of "wanton" conduct may be considered hyperbole, she makes a clear factual claim that Abbott deliberately falsified her applications and that an AKC investigation confirmed this claim. The motion for judgment on the pleadings regarding Statement ii is denied.

Statement iii. ("The Way It Is," written by Defendant Tietjen).

> Sources have reported that by a six to five vote, the Board of Directors... elected to send the Abbott judging applications to an independent investigative committee.. . The purpose of the committee is to investigate whether or not the applicant made false statements prejudicial to the best interest of AKC.

Statement iii agrees with the facts alleged in the complaint. Compl. ¶ 44. The statement is true, and the motion for judgement on the pleadings regarding Statement iii is granted.

Statement iv. ("The Way It Is," written by Defendant Tietjen).

> Those who thought there was nothing wrong with the Abbott application, or considered it to consist of little more than white lies, minor exaggerations, or forgotten memory probably feel the penalty was too harsh. Those who were directly involved in the matter

> by being "used" by Mrs. Abbott and then subsequently maligned by her and her cohorts feel nothing short of a public hanging was sufficient justice.

Statement iv is the author's opinion, yet it relies on the assertions that Abbott "'used'" and "maligned" people. Whether or not Abbott "'used'" people is too amorphous a charge to be proven true or false. The allegation that Abbott maligned people, defined as "utter[ing] injuriously misleading or false reports," may be established. Webster's Third New International Dictionary 1367 (1986). The statement thus contains "a provably false factual connotation" that may reasonably expose Abbott to contempt, ridicule or disgrace. Milkovich, 497 U.S. at 17-21, 110 S.Ct. at 2704-2707; Foster, 87 N.Y.2d at 751, 642 N.Y.S.2d at 587. The motion for judgement on the pleadings regarding Statement iv is denied.

Statement v (Editorial "The Board Must Bow Out" appearing in Dog News.)

> This combined with the mess made out of the Abbott situation really erodes any confidence in the approval of judges one may have had for the Board to do so.

Statement v cannot sustain a cause of action for defamation for several reasons. First, it is not defamatory of Abbott. Although the editorial is critical, the criticism is directed toward the AKC Board and its procedures. It is unclear what "mess" the editorial refers to, as it was published in January 1996, the month that the AKC reinstated Abbott as a judge. Compl. ¶ 48. Statement v could just as easily be about the "mess" of

Abbott's suspension as it could be about the "mess" of her reinstatement.

Second, the statement is protected opinion, as evidenced by its publication on a page titled "Editorial" and the use of persuasive and tendentious language. See Millus v. Newsday, 89 N.Y.2d 840, 842, 652 N.Y.S.2d 726, 727 (N.Y. 1996). Lastly, the statement is true, as the pleadings lead to the unavoidable conclusion that the controversy surrounding Abbott's applications created a "situation," and that some people were unhappy about the outcome. The motion for judgment on the pleadings regarding Statement v is granted.

Statement vi (Editorial "Everyone Does Not Lie" appearing in Dog News.)

> It is ironic that two British judges who were suspended for five years ... for falsifying information on their judging applications arrived in California the same week AKC's Board decided to award seven breeds to a person in America who allegedly committed similar transgressions. ... no Elaine, No Patti not everyone lies on their judging application.

Statement vi cannot support a cause of action for defamation because it is true as acknowledged by the Complaint. Compl. ¶¶ 43-50. Specifically, Abbott was granted permission to judge and she was alleged to have falsified her application. Falsity is an essential element of defamation in New York, and the motion for judgment on the pleadings regarding Statement vi is granted.

Statement vii ("The Gossip Column" appearing in Dog News)

> The episode that took place last week with the Board of Directors granting judging approval of seven breeds to Vicki Abbott has taken on the moniker VIC-FIX.

Assuming this to be a false statement, it could not reasonably expose Abbott to "contempt, ridicule, aversion or disgrace." Foster, 87 N.Y.2d at 751, 642 N.Y.S.2d at 587. The statement is insufficient because it implies that the AKC Board, not Abbott, was corrupt in approving Abbott's application. Read in context, Statement vii is not defamatory, and the motion for judgment on the pleadings regarding Statement vii is granted.

Statement viii ("Kodner's Korner" appearing in Dog News)

> The AKC has made it abundantly clear that anyone can become a judge even if they are just a little bit dishonest. Can you be just a little bit pregnant?

This statement is defamatory because it accuses Abbott of being a liar. The tone of the piece suggests what the title implies: that it is author Kodner's personal opinion. Statement viii is not protected opinion because it contains a "provably false factual connotation," i.e. that Abbott is dishonest. Milkovich, 497 U.S. at 17-21, 110 S.Ct. at 2704-2707. Turning to the New York Gross tests, the statement may be readily understood to accuse Abbott of lying and may be proven false. Although Kodner's criticism of the AKC is clearly opinion, it is based on the factual assertion that Abbott was dishonest in the application process. The article does not provide the facts underlying this assertion nor does it imply that no such facts

exist. Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d at 817. The statement is thus actionable, and the motion for judgment on the pleadings regarding Statement viii is denied.

Statement ix ("Kodner's Korner" appearing in Dog News)

> I do not want to see the issuance of judging approvals become a form of political patronage.

This statement is not defamatory of Abbott in any way, shape or form. The motion for judgment on the pleadings regarding Statement ix is granted.

Statement x ("Cold, Cold St. Paul" written by defendant Stander appearing in Dog News)

> It is truly amazing the way my 'bad' guys on the Board have reacted to the Abbott case. Jim Smith's statement that her investigation was nothing more than a 'witch hunt' is as astounding to me. No one knows or likes Vicki better than I do and if there is a chance the motivation behind the initial investigation was less than pure (and I am not even certain of this being the case) the fact remains that the investigation did prove ample transgressions by her. ... I was listed by Vicki, I am told, (not by her) as having spoken to her about English Toy Spaniels ... but to the best of my recollection I never spoke to her about the breed.

Statement x is also written in the style of an editorial or opinion piece. However, it is not protected opinion under Milkovich because it includes the verifiable assertions that "the investigation did prove ample transgressions by [Abbott]," including "unexplained exaggerations, misfed information and possibly down right lies." Stander also wrote that someone told him that Abbott reported having a conversation with him about English Toy Spaniels that he did not remember. Statement x is

actionable as a defamatory statement because it states that Abbott was misleading in her judging applications. This statement could reasonably lead to contempt and ridicule among dog handlers and judges. The language clearly states that Abbott exaggerated and "misfed information" on her application and that an investigation proved these facts. Statement x also asserts that Abbott claimed to have had a conversation with Stander that she did not. These facts can be proven false and are presented as fact within an opinion piece. Gross, 82 N.Y.2d at 153, 603 N.Y.S.2d at 817. As such, Statement x is actionable and the motion for judgment on the pleadings is denied.

Statement xi (Letter, Stander to Robert Berndt, president of AKC)

> Whether or not she (Abbott) actually lied on her application is unknown to me personally, but many people to whom I have spoken tell me she blatantly and illegally used their names as references when in fact they claim never to have spoken to her at all about the breeds or situations in question.

The question raised by Statement xi is not whether it is defamatory but whether it is privileged. New York recognizes a qualified privilege for communications made to others with a common interest. Liberman v. Gelstein, 80 N.Y.2d 429,436, 590 N.Y.S.2d 857, 861 (N.Y. 1992); Friedman v. Ergin, 487 N.Y.S.2d 109 (N.Y. App. Div. 1985); Wright v. Johnson, 584 N.Y.S.2d 305 (N.Y. App. Div. 1992).

It is not possible to dispose of a claim of qualified privilege pursuant to Rules 12(b)(6) or 12(c). Although Stander's letter appears to be privileged because it concerns dog show judging, a matter of concern to him, this privilege may be overcome by a showing of malice. Friedman, 111 N.Y.S.2d at 111. Abbott alleges that the above statements were made with actual malice toward her. Compl. ¶ 64. While this conclusory allegation would be insufficient upon a summary judgment motion, it is enough to sustain the cause of action beyond this Rule 12(c) motion.

Statement xi is defamatory because it alleges Abbott lied. The statement is thus actionable, and the motion for judgment on the pleadings regarding statement xi is denied.

Statement xii ("The Week That Was" written by defendant Stander published in Dog News)

Other aspects of the document worth noting were misstatements of fac the Vicki Abbott investigation.

Statement xii does not defame Abbott. The sentence criticizes a document that Abbott did not write, and any failure of the document to correctly characterize Abbott's judging application or the surrounding controversy is simply not actionable. The motion for judgment on the pleadings regarding Statement xii is granted.

Statement xiii ("The Week That Was" written by defendant Stander published in Dog News)

> Now then, the Vicky Abbott matter is settled for the time being. She was found guilty of certainly exaggerating on one of her applications and put on hold to apply as a judge again for seven years.

Statement xiii is not defamatory as it merely repeats facts acknowledged to be true in the Complaint. Compl. ¶ 56. The motion for judgment on the pleadings regarding Statement xiii is granted.

Statement xiv (Editorial: "Who if Anyone at Staff Should Pay the Piper?" published in Dog News)

> Okay let's accept the fact that Mrs. Abbott was wrong and should have been penalized.

This statement is not defamatory for several reasons. First, it is the writer's opinion because it is written in a manner which indicates it is opinion and the phrases "wrong" and "should have been penalized" cannot be established as true or not. It was also published on a page titled "Editorial." See Millus, 89 N.Y.2d at 842, 652 N.Y.S.2d at 727. Second, the statement assumes hypothetical facts but does not assert their truth. Even if the statement is considered to report facts regarding Abbott, it is true that Abbott was found to be "wrong" by the AKC. Compl. ¶ 56.

Statement xiv is not defamatory and the motion for judgment on the pleadings regarding Statement xiv is granted.

Statement xv (AKC Board Minutes (a) and MacDonald letter (b))[3]

[3]Two separate statements are included under the heading "xv." The Court will refer to the Board Minutes as xv(a) and the MacDonald letter as xv(b).

> (a) There was a confidential discussion on the two investigative reports related the judging application of Mrs. Vicki Abbott. During this session the following actions were taken: The Board voted to accept the reports of the Investigative Trial Board and the Outside Investigations Agency. The Board voted to revoke the judging approval of Mrs. Abbott and to advise her that AKC will not entertain another judging application from her for a period of seven years.
>
> (b) The integrity of all judges and the ethics of our entire sport may have been put in jeopardy. Integrity has always been of supreme importance to all of us and is indeed the very backbone of the dog game. Recent and present problems with an applicant's possible misrepresentations are of grave concern.

Statement xv(a) is true as acknowledged in the Complaint. Compl. ¶ 56. It is thus not defamatory.

Statement xv(b) is also not defamatory because referring to "possible misrepresentations" Abbott made on her application does not expose her to "contempt, ridicule, aversion or disgrace." Foster, 87 N.Y.2d at 751, 642 N.Y.S.2d at 587. The motion for judgment on the pleadings as to Statement xv is granted.

Statement xvi (Hearn Memorandum)

> I am secretary for two judges organizations - a local and a national one. I can tell you unequivocally these two groups are highly angered over the recent AKC approval of a judging application with blatant questionable authenticity. So much so that the Dog Judges Association of America requested interview time with the AKC Board to present the feelings of judges everywhere.

Statement xvi is not defamatory because it cannot be proved false. The allegation that Abbott's application was of "blatant

questionable authenticity" is true. Enough people questioned the authenticity of the application to give rise to a belabored review process and investigation. Compl. ¶¶ 42-56. The motion for judgment on the pleadings regarding statement xvi is granted.

It is unclear whether plaintiff seeks relief for the statement contained in Paragraph 57 by David Merriam: "it's my understanding that the basis of the Board's action had to do with intentional misinformation included on the (Abbott's) judging application." This statement is true as it reports facts acknowledged in the complaint. It is not defamatory.

Finally, the defamation claims against Mary Beth O'Neill and Anne Savory are dismissed because the complaint lacks any allegation that they made defamatory statements.

The Third Cause of Action

The third cause of action alleges that the defendants participated in a conspiracy to defame Abbott. New York does not recognize the tort of civil conspiracy. In re Hougibant, 914 F.Supp 964, 989 (S.D.N.Y. 1995); Rivera v Greenberg, 663 N.Y.S.2d 628, 629, (N.Y. App. Div. 1997).

The third cause of action is dismissed as to all defendants.

SO ORDERED.

Dated: New York, New York
December __, 1998

_____

JOHN S. MARTIN, JR., U.S.D.J.

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